IN THE COURT OF APPEALS OF IOWA

No. 7-817 / 06-0591
Filed January 16, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JEFFREY WAIN DRAPER,
Defendant-Appellant.

Appeal from the Iowa District Court for Cherokee County, Edward A. Jacobson, Judge.

Defendant appeals his convictions for possession of a controlled substance with intent to deliver, manufacture of a controlled substance, and possession of ephedrine. **CONDITIONALLY AFFIRMED AND REMANDED.**

Mark C. Smith, State Appellate Defender, and David Arthur Adams, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, and Mike Houchins, County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Baker, J., and Brown, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

PER CURIAM

I. Background Facts & Proceedings

On December 22, 2004, Jeffrey Draper and Lola Cooper were charged with the following counts: (I) possession of a controlled substance (methamphetamine) with intent to deliver within 1000 feet of a public park; (II) manufacturing a controlled substance (methamphetamine) within 1000 feet of a public park; (III) possession of ephedrine with intent to manufacture; (IV) possession of anhydrous ammonia with intent to manufacture; (V) unlawful gatherings where controlled substances are distributed; (VI) failure to affix a tax stamp; (VII) domestic abuse assault; and (VIII) facilitation of a criminal network.

Susan Flander, a public defender, was appointed to represent Draper. On Draper's behalf Flander filed a motion to sever, a motion to dismiss, a motion to produce, a motion to suppress, and a motion for change of venue.[1] While these motions were pending, Draper became unhappy with Flander's representation and on March 16, 2005, asked the district court to appoint different counsel. He asked to be able to select counsel to represent him. The district court denied his request for new counsel. Thereafter, Flander filed a motion to withdraw. After a hearing the district court granted the motion, and on May 5, 2005, appointed James A. Clarity as defense counsel.

Defendant filed a pro se objection to having Clarity appointed as his counsel, based on his belief he should be able to pick the court-appointed

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[1] The district court granted the motion to sever Draper's criminal trial from that of Cooper. Also, the charge of domestic abuse was severed from the other charges. The court dismissed counts V and VIII. The court denied the motions to suppress and motion for change of venue.

counsel to represent him.[2] Draper had also filed about thirty pro se motions and other documents with the court.[3] In May 2005, the court dismissed all but three of these, and set them for hearing. A pre-trial hearing was set before a different district court judge. After some discussion that judge recused himself, and a judge from a different part of the district took over the case.

A pre-trial hearing was held on July 12, 2005. At the hearing Draper asked to have Clarity removed as his counsel. The court heard Draper's complaints, and overruled his motion for substitute counsel. The court then proceeded to hear Draper's pro se motions.

At one point during the hearing Draper stated, "So I guess my only other alternative is is that I guess I would want to have to go pro se." Draper continually stated he felt Clarity, the prosecutor, and the judge were in collusion against him, and that he did not trust lawyers. The judge engaged in a lengthy colloquy with Draper to establish what would be required of him if he decided to represent himself. Eventually Draper stated, "As long as he is more of a – is truly on my side, yes, sir. And I do want a good lawyer. I do." Draper also stated about his attorney, "If he'll just try to work with me a little better, I think we could get through this all right. He's a likeable guy." The court came to the conclusion

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[2] As a matter of fact, the district court had contacted the attorneys Draper had listed, but none of the attorneys were interested in representing Draper.

[3] As an aside, we note that Draper insisted during the course of the case that under *Leonard v. State*, 461 N.W.2d 465, 468 (Iowa 1990), he had the right to file documents in addition to those filed by his counsel. In *Leonard*, the supreme court was specifically referring to postconviction applicants, not criminal defendants, because in a postconviction case the district court may deny a postconviction relief applicant's request to dispense with counsel. *Leonard*, 461 N.W.2d at 468. In order to temper the dilemma of postconviction applicants when a court refuses to remove counsel, the court permits such applicants to file pro se documents. *Id.*; *see also Jones v. State*, 731 N.W.2d 388, 391-92 (Iowa 2007).

Draper did not really want to represent himself, and Draper replied, "No. I really don't want to. I don't." The court determined Clarity would not be asked to step down.

Although on July 13, 2005, Draper stated he would be willing to work with Clarity, on August 1 he filed an application for a no-contact order against his attorney stating the attorney had "harassed" him by attempting to telephone him at the jail. Based on this and other new pro se documents filed by Draper, the court on its own motion held a hearing to determine Draper's competence to assist in his own defense.[4] Draper agreed to go ahead with a competency evaluation, but as soon as the court entered an order for the competency evaluation, Draper filed a pro se motion objecting to the order. The evaluation showed Draper was capable of assisting in his defense. Draper filed ethics complaints against Clarity, prosecutor Houchins, and Judge Jacobsen.[5]

Draper continued his campaign of filing motions and other documents with the court, including a request to have Judge Jacobsen recuse himself. Defense counsel filed a motion for change of venue, and a motion to withdraw. These pending motions were heard on December 13, 2005. The court came to the conclusion Draper's complaints were not credible, stating:

> He got his first court-appointed attorney removed, got every judge in 3A removed, he is working on getting the second court-appointed attorney removed and he's now trying to start on the 3B judges and have me removed.

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[4] During the competency hearing Draper stated he wanted to represent himself, with assistance. The district court stated the issue of competency had to be determined first. After the competency hearing Draper did not renew his request to represent himself with assistance.

[5] Draper had also previously filed ethics complaints against the county attorney and another district court judge.

> I was willing to accept the possibility that he was doing all that because of his mental health issue. And now having found that he doesn't have a mental health issue, I have to assume he's doing all that in some intentional effort to avoid taking this case to trial.

The court informed Draper he did not have "the right to choose your trial judge and you don't have the right to choose your court-appointed attorney." The court informed Draper it was too late to get another attorney before the trial which was scheduled for January 10, 2006, and Draper had stated he did not want to proceed pro se. Draper responded, "I can present my case. I know the issues about what happened. I know that." The court overruled the motions for recusal and Clarity's motion to withdraw. The court granted the motion for change of venue, and the case was moved from Clay County to Cherokee County.

The case proceeded to trial as scheduled. After the State rested, defense counsel moved for a judgment of acquittal. The court granted the motion as to count IV, possession of anhydrous ammonia. The State subsequently asked to have count VI, the tax stamp charge, dismissed. A jury found defendant guilty of counts I (possession with intent to deliver), II (manufacturing a controlled substance), and III (possession of ephedrine with intent to manufacture).

Defense counsel filed a motion for new trial. The court denied the motion. During the hearing on the motion for new trial Draper claimed he received ineffective assistance because defense counsel did not raise all of the issues Draper wanted to be raised.

Draper was sentenced to a term of imprisonment not to exceed thirty years on each of counts I and II, to be served consecutively, and a term not to exceed five years on count III, also to be served consecutively. Draper now

appeals his convictions,[6] claiming the district court denied him his constitutional right to represent himself. He also claims the court used an incorrect standard of review on the motion for new trial.

II. Self-Representation

We review Sixth Amendment claims de novo. *State v. Martin*, 608 N.W.2d 445, 449 (Iowa 2000). Under the Sixth Amendment, a defendant has the right to legal representation. *Faretta v. California*, 422 U.S. 806, 807, 95 S. Ct. 2525, 2527, 45 L. Ed. 2d 562, 566 (1975); *State v. Stephenson*, 608 N.W.2d 778, 782 (Iowa 2000). The Sixth Amendment also "grants to the accused personally the right to make his defense." *Faretta*, 422 U.S. at 819, 95 S. Ct. at 2533, 45 L. Ed. 2d at 572. The right to self-representation is not effective until asserted. *State v. Rater*, 568 N.W.2d 655, 658 (Iowa 1997). We engage in every reasonable presumption against the waiver of the right to counsel. *Id.* at 661.

In order to invoke the right to self-representation, "a defendant must knowingly, intelligently, voluntarily, and unequivocally waive his right to counsel and state his intentions to represent himself." *Hamilton v. Groose*, 28 F.3d 859, 861 (8th Cir. 1994). A court has a "serious and weighty duty" to determine whether a waiver is competent and intelligent. *State v. Cooley*, 608 N.W.2d 9, 15 (Iowa 2000). In order to make this determination the court must engage the defendant in a colloquy on the record "sufficient to apprise a defendant of the dangers and disadvantages inherent in self-representation." *Stephenson*, 608 N.W.2d at 782. Unless a defendant properly waives the right to counsel, the

[6] Draper filed a pro se motion to stay this appeal. We deny the motion for stay, and proceed to address the merits of the appeal.

defendant still has the constitutionally protected right to counsel. *Hannan v. State*, 732 N.W.2d 45, 52 (Iowa 2007).

In the present case, during the pre-trial hearing in July 2005 the district court engaged Draper in a lengthy colloquy so that he would know what would be expected of him if he decided to represent himself. At the end of the colloquy Draper stated he did not want to represent himself. The court concluded Clarity would continue to represent Draper.

During the December 2005 hearing, Draper was asking to replace Clarity, not for self-representation. The court reminded Draper that it had already determined he was not interested in representing himself. Draper's statement, "I can present my case. I know the issues about what happened. I know that," was not a clear and unequivocal waiver of his right to counsel. At that point Draper had reiterated several times that he wanted counsel to represent him, although he had specific ideas about what he wanted counsel to do. The court had also made a finding that Draper's pro se motions and complaints were made with the intention of delaying the trial. *See Hamilton*, 28 F.3d at 862 ("Furthermore, a defendant may not manipulate the right [to self-representation] in order to delay or disrupt the trial.").

Between the December hearing and the trial on January 10, 2006, Draper again filed numerous pro se motions and comments. In none of these does he express a desire for self-representation. On the day of trial, there were extended plea discussions, eventually rejected by Draper. Again, the record does not reflect any mention that Draper wished to proceed without counsel. The post-trial

record also does not raise this issue. This all serves to support our conclusion that the single statement at the December hearing fell considerably short of overcoming the judicial reluctance to find a defendant intentionally waived his right to counsel.

We conclude Draper has failed to show he made a knowing, intelligent, voluntary, and unequivocal waiver of his right to counsel in this case. We conclude Draper was not denied his Sixth Amendment right to self-representation.

III. Motion for New Trial

Draper asserts the district court used the wrong standard in considering whether he was entitled to a new trial based on his claim the verdict was contrary to the weight of the evidence. The district court stated:

> The court finds the jury was properly instructed and the evidence was fully presented and that there was clearly sufficient evidence, which if believed by the jury, was sufficient to convict the defendant. And obviously the jury did convict the defendant based upon that evidence.

The State agreed the district court improperly used a "sufficiency of the evidence" standard instead of a "weight of the evidence" standard. In considering a motion for new trial, if the court concludes the verdict is contrary to the weight of the evidence and that a miscarriage of justice may have resulted, the verdict may be set aside. *State v. Ellis*, 578 N.W.2d 655, 658-59 (Iowa 1998).

We conclude the district court's ruling on the issue in the motion for new trial as to whether the verdict was contrary to the weight of the evidence utilized an improper standard. The ruling should be reversed and the matter remanded

to the district court. However, we determine a reversal of defendant's convictions is not necessary because on remand the district court could determine a new trial is not warranted. If the district court denies the motion for new trial on remand, our affirmance will stand. On the other hand, if the district court grants the motion, Draper's convictions will be set aside and the court will order a new trial. We do not retain jurisdiction.

CONDITIONALLY AFFIRMED AND REMANDED.